

## Defining the Constitutional Question in Partisan Gerrymandering

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### Recommended Citation

Briffault, Richard (2005) "Defining the Constitutional Question in Partisan Gerrymandering," *Cornell Journal of Law and Public Policy*: Vol. 14: Iss. 3, Article 2.

Available at: <http://scholarship.law.cornell.edu/cjlpp/vol14/iss3/2>

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# DEFINING THE CONSTITUTIONAL QUESTION IN PARTISAN GERRYMANDERING

Richard Briffault†

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## I. JUSTICIABILITY AND CONSTITUTIONALITY IN VIETH

*Vieth v. Jubelirer*<sup>1</sup> is a significant setback to efforts to challenge partisan gerrymandering in court. Four members of the Supreme Court repudiated *Davis v. Bandemer*<sup>2</sup> and concluded that partisan gerrymanders present a nonjusticiable question, while the fifth, Justice Kennedy, determined that the Court ought to “refrain from intervention”<sup>3</sup> at this time, although he left open the hope that gerrymandering might become justiciable if the right standard of proving a gerrymander is ever found. Yet, strikingly, all nine members of the Supreme Court agreed that, justiciable or not, partisan gerrymanders do raise a constitutional question and some partisan gerrymanders are unconstitutional. Indeed, Justice Scalia’s plurality opinion noted that “severe partisan gerrymanders” are incompatible with “democratic principles” and are presumptively unconstitutional.<sup>4</sup> Justice Scalia analogized “severe partisan gerrymanders” to a decision by the Senate to “employ, in impeachment proceedings, procedures that are incompatible with its obligation to ‘try’ impeachments.”<sup>5</sup> Such an action would “violate the Constitution” even though it might not

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<sup>1</sup> 541 U.S. 267 (2004).

<sup>2</sup> 478 U.S. 109 (1986).

<sup>3</sup> 541 U.S. at 317.

<sup>4</sup> *Id.* at 292.

<sup>5</sup> *Id.* (citing *Nixon v. United States*, 506 U.S. 224 (1993), which held nonjusticiable a challenge to the constitutionality of a Senate rule used in trying impeachments).

be “for the courts to say when a violation has occurred, and to design a remedy.”<sup>6</sup> Justice Kennedy apparently agreed with the unconstitutionality of gerrymandering<sup>7</sup> as, of course, did the four dissenters. Presumably because the plurality concluded that gerrymandering claims are nonjusticiable, Justice Scalia said very little about why partisan gerrymandering is unconstitutional. The concurring and dissenting justices also focused on the linked questions of justiciability and standard of proof of gerrymandering, and said relatively little about what makes gerrymandering unconstitutional.

Professor Daniel Lowenstein, in his article, *Vieth's Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, differs with the plurality on the question of justiciability and with the Court as a whole on the question of constitutionality.<sup>8</sup> In his view, partisan gerrymandering *does* present a justiciable question, but, on the merits, he finds that gerrymandering is almost never unconstitutional. Only when gerrymandering is aimed at a “pariah” group<sup>9</sup> subject to the kind of “pervasive discrimination” comparable to that inflicted on African-Americans in the Jim Crow South<sup>10</sup> or when it is used to “permanently”<sup>11</sup> exclude a majority group from control of a state legislature would Professor Lowenstein find that gerrymandering violates the Constitution. Professor Lowenstein rightly concludes that the likelihood of the first type of claim arising is “small” and of the second “even smaller.”<sup>12</sup> He emphatically rejects the “excessive partisanship” theory of the unconstitutionality of gerrymandering. He asserts as a matter of principle—and not just out of a pragmatic concern about “manageability”<sup>13</sup>—that excessive partisanship in legislative apportionment is not only constitutional but is also consistent with both the letter and spirit of the Constitution. The heart of his argument on the constitutionality of gerrymandering is that “the Constitution does not try to prevent political competition from going ‘too far.’ It *depends* on competition to preserve the balanced structure of the government.”<sup>14</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 316.

<sup>8</sup> Daniel Lowenstein, *Vieth's Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL'Y 367 (2005) [hereinafter Lowenstein, *Vieth's Gap*].

<sup>9</sup> *Id.* at 378 n.54.

<sup>10</sup> *Id.* at 377-78.

<sup>11</sup> *Id.* at 378.

<sup>12</sup> *Id.* at 378 n.54.

<sup>13</sup> *Cf. id.* at 385-86 (Professor Lowenstein contrasts his position with the plurality's approach, noting that the plurality breaks with Justice Breyer's standard for assessing the constitutionality of gerrymandering because of “a denial of its practicality, not a difference in principle.”).

<sup>14</sup> *Id.* at 385 (emphasis in original).

I agree with Professor Lowenstein on two key points—that the substantive merits of the constitutionality of partisan gerrymandering must be given much greater attention than they have so far received, and that excessive partisanship is the most important constitutional argument against partisan gerrymandering.<sup>15</sup>

On the first point, it is astonishing how little attention the Supreme Court has given, in either *Bandemer* or *Vieth*, to the question of *why* partisan gerrymandering might be unconstitutional. The Justices have bounced back and forth between the question of justiciability and the standards of proving partisan gerrymandering without addressing, at any length, which constitutional provision or norm gerrymandering might violate. Of course, to the extent that the gist of the justiciability debate turns on whether there are “judicially discoverable and manageable standards”<sup>16</sup> for resolving gerrymandering claims, the issue of standards is critical, and the justiciability and standards questions are closely linked. Yet, as Professor Lowenstein points out by paraphrasing Justice Scalia’s criticism of Justice Souter’s dissent, one cannot decide on standards for proving gerrymandering “without specifying what one would like to test *for*.”<sup>17</sup> As Professor Lowenstein notes, a consistent theme in Justice Scalia’s critique of the gerrymandering standards put forward by the dissenters is their failure to link up their gerrymandering tests with a theory of *why* gerrymandering is unconstitutional.<sup>18</sup> Justice Scalia, of course, is equally guilty of asserting that the “*excessive* injection of politics [into

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<sup>15</sup> Professor Lowenstein makes a number of other important points in his article—that the congressional redistricting at issue in *Vieth* might be treated differently than the state legislative redistricting in *Bandemer*, *see id.* at 371-73, that Justice Scalia’s plurality opinion errs in finding that the *Bandemer* standard is judicially unmanageable, *see id.* at 374-76, and that due to the split between the plurality and Justice Kennedy, *Bandemer* is still good law, *see id.* at 388-94. On the first point, since the gravamen of the constitutional violation caused by gerrymandering is the excessive pursuit of legislators’ personal and partisan self-interest and not, as Professor Lowenstein indicates, the favoring of one party over another in the conversion of votes into legislative seats, *see id.* at 372, then state legislative reapportionment of congressional districts is just as susceptible to a gerrymandering challenge as a state legislature’s reapportionment of itself. On the third point, I agree with Professor Lowenstein that since there was not a majority in *Vieth* for holding partisan gerrymandering nonjusticiable, “*Bandemer v. Davis* is still the law.” *Id.* at 390. On the other hand, as I indicate below, the substantive theory of the unconstitutionality of gerrymandering that informed the *Bandemer* plurality’s analysis is no longer accepted by a majority of the Court so that the *Bandemer* plurality opinion’s standards for proving gerrymandering are no longer determinative. On the second point, Professor Lowenstein is devastatingly effective in arguing against Justice Scalia that a standard that yields consistent results in every case in which it is applied is certainly manageable. *See id.* at 375. My disagreement with the *Bandemer* standard, and, thus, with Professor Lowenstein, concerns its substance, not its manageability.

<sup>16</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>17</sup> Lowenstein, *Vieth’s Gap*, *supra* note 8, at 384 (discussing *Vieth*).

<sup>18</sup> *See id.* at 371.

districting] is *unlawful*”<sup>19</sup> without explaining which constitutional provision or rule such partisan gerrymandering violates.<sup>20</sup>

On the second point, Professor Lowenstein is also right to focus on the claim that excessive partisanship in redistricting is a constitutional concern. With its implicit endorsement by the plurality and somewhat greater, albeit still limited, articulation in Justice Stevens’ dissent,<sup>21</sup> this critique of partisan gerrymandering appears to command the support of a majority of the Court. Moreover, as I will suggest below, none of the other theories in judicial opinions and the academic literature is likely to succeed in illuminating why gerrymandering is unconstitutional.

I disagree completely, however, with Professor Lowenstein’s contention that the extreme partisanship and excessive legislative self-interest arguments are “contrary to the Constitution.”<sup>22</sup> Quite the opposite. Our constitutional system of republican government is based on the people’s ability to control its elected representatives. As James Madison put it, “[t]he genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people.”<sup>23</sup> Legislative districting that manipulates district boundaries for the primary purpose of securing the election or reelection of a specific officeholder or the power of a specific political party violates the constitutional norm of popular sovereignty. To be sure, articulating a test for gerrymandering that distinguishes between permissible and excessive use of partisanship or other forms of legislative self-interest is difficult; this difficulty fuels the concern over whether there *are* judicially manageable standards for resolving such gerrymandering claims. But, as a matter of principle, an allegation of partisan gerrymandering—defined as legislative districting primarily, if not exclusively, intended to advance the political fortunes of individual legislators or particular parties—should be treated as stating a constitutional claim.

In this Comment, I review the principal arguments as to why partisan gerrymandering is unconstitutional. I argue that there have been four such arguments in judicial opinions and the academic literature: vote dilution in violation of the Equal Protection Clause of the Fourteenth Amendment; burdening the right of political association under the First Amendment; frustrating the competitiveness necessary for democratic elections; and excessive partisanship. However, excessive partisanship—broadened and restated as excessive legislative pursuit of partisan

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<sup>19</sup> *Vieth*, 541 U.S. at 293.

<sup>20</sup> Lowenstein, *Vieth’s Gap*, *supra* note 8, at 383-84.

<sup>21</sup> *Vieth*, 541 U.S. at 317-18, 326. *See also id.* at 316 (Kennedy, J., concurring).

<sup>22</sup> Lowenstein, *Vieth’s Gap*, *supra* note 8, at 384.

<sup>23</sup> THE FEDERALIST NO. 37 at 234 (James Madison) (Heritage Press ed., 1945).

self-interest or individual legislator self-interest—is the argument that best captures the constitutional values threatened by gerrymandering.<sup>24</sup> I then briefly address the justiciability concern necessarily implicated by this understanding of the constitutional problem posed by gerrymandering. I suggest that although this approach to gerrymandering raises a real judicial manageability issue, recent cases and the academic literature suggest that assessing whether a districting plan is tainted by excessive legislative pursuit of self-interest may not be as intractable as is generally supposed.

## II. THE CONSTITUTIONAL ARGUMENTS AGAINST PARTISAN GERRYMANDERING

Judicial opinions and academic literature indicate that there are four constitutional arguments against partisan gerrymandering: vote dilution under the Equal Protection Clause of the Fourteenth Amendment; burdening political association in violation of the First Amendment; interfering with the competitive elections required for a functional democracy; and excessive partisanship in violation of the legislature's obligation to legislate in the public interest.

The first two arguments have the most obvious roots in the constitutional text and case law. Both focus on the impact of partisan gerrymandering on the representational interests of the voters whose party has been harmed by gerrymandering. Ultimately, however, neither argument is likely to state a successful constitutional case against gerrymandering, at least in part because both arguments are in tension with the use of districting to elect legislators. Competitiveness is an argument that has, thus far, only been found in the academic literature. It is a concern that is self-consciously structural; that is, it is focused on the corrupting impact of gerrymandering on the political process as a whole, rather than on the individual rights of voters or the rights of discrete groups of voters. It suffers from the lack of a clear constitutional basis for a concern about electoral competition. Moreover, it is also in tension with the use of districts to elect legislators. Excessive partisanship—or, as I will emphasize, excessive pursuit of incumbents' partisan and individual self-interest—is focused primarily on the motives of legislators. The excessive partisanship argument also suffers from the lack of a clear basis in the constitutional text, and raises the difficult question of distinguishing be-

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<sup>24</sup> Justice Breyer's dissent presents a fifth possible argument—the “entrenchment” of a minority and the frustration of majority rule. *See Vieth*, 541 U.S. at 355-68. As I will suggest below, the majority rule argument seems to be a subset of the vote dilution concern limited to majorities, with the “entrenchment” bringing into play the bad legislative motivation which is the gist of the excessive partisanship theory. As a result, it is not really an additional constitutional argument.

tween permissible and impermissible pursuit of legislative self-interest. However, it promotes the structural interest in democratic accountability while resonating with the constitutional norm that legislators must act to promote the public interest and not their own self-interest. The excessive self-interest argument draws from each of the other theories for challenging gerrymandering, but it is alone among the constitutional arguments in being consistent with the use of districts to elect representatives.

#### A. VOTE DILUTION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

By the vote dilution argument, I mean the charge that partisan gerrymandering is unconstitutional because, and to the extent that, it denies a political party the share of seats in the legislature to which it would otherwise be entitled based on its share of votes in legislative elections. Emerging under the rubric of the Equal Protection Clause, vote dilution was the initial framework for the Court's approach to partisan gerrymandering, and it has generally shaped the Court's analysis of the constitutional rules governing legislative representation. The foundational vote dilution case is *Reynolds v. Sims*,<sup>25</sup> in which the Court first articulated and adopted the "one person, one vote" rule as the constitutional ground norm for legislative apportionment. *Reynolds* held that, due to the fundamental nature of the right to vote, each voter is not simply entitled to cast a ballot, but has a constitutional right to an equally weighted, or undiluted, vote relative to the votes of others. Although *Reynolds* can be seen as an individual voters' rights case,<sup>26</sup> constitutional protection against vote dilution was soon extended to racial minority groups.<sup>27</sup> The racial vote dilution cases involved multi-member districts or at-large elections in which the votes of minority voters had the same formal voting weight as the votes of white voters, but the use of the multi-member district or at-large structure made it harder for minority voters to elect their preferred candidates and, thus, "diluted" their votes. The Supreme Court agreed that such racial vote dilution states a claim under the Equal Protection Clause. Although Professor Lowenstein contends that the racial vote dilution cases are better seen as "suspect classifications" cases and not "'voting rights' case[s],"<sup>28</sup> the Court repeatedly stressed in these

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<sup>25</sup> 377 U.S. 533 (1964).

<sup>26</sup> Professor Lowenstein takes this position. See Lowenstein, *Vieth's Gap*, *supra* note 8, at 381-82.

<sup>27</sup> See, e.g., *White v. Regester*, 412 U.S. 755, 765 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

<sup>28</sup> Lowenstein, *Vieth's Gap*, *supra* note 8, at 377.

cases its concern with the impact of districting on the "voting strength"<sup>29</sup> of racial groups. Race and the burden on political rights are interlinked, and both seem critical to the doctrine.

*Davis v. Bandemer* reflects the vote dilution approach to partisan gerrymandering. The opening paragraph of Justice White's opinion refers to gerrymandering as presenting an issue of "unconstitutional vote dilution."<sup>30</sup> The majority's justiciability analysis begins with the one person-one vote cases<sup>31</sup> before quickly linking them to the racial vote dilution cases.<sup>32</sup> The plurality's ultimate rejection of the partisan gerrymandering claim on the merits rested on the finding that the districting plans at issue did not unconstitutionally dilute plaintiffs' votes.<sup>33</sup> To be sure, the plurality denied that the Constitution requires a straightforward relationship between votes and seats.<sup>34</sup> Moreover, unlike one person-one vote, under the *Bandemer* plurality's approach, constitutional partisan vote dilution occurs only if a districting plan produces "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."<sup>35</sup> One of the state legislative districting plans at issue in *Bandemer* gave plaintiffs their fair share of legislative seats<sup>36</sup> while the other produced just a modest underrepresentation in a single election,<sup>37</sup> and thus, could not show "continued frustration" of the will of the voters. In effect, as Bruce Cain has put it, *Bandemer* adopted a "vote dilution plus" standard.<sup>38</sup> Yet, it was vote dilution or the lack thereof that determined whether the gerrymanders in question were unconstitutional.

Thus, under *Bandemer*, vote dilution is the type of constitutional problem that partisan gerrymandering raises, but the dilution must be significant and protracted in order to state a claim. In his endorsement of

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<sup>29</sup> *White*, 412 U.S. at 765; *Whitcomb*, 403 U.S. at 143-44; *Burns*, 384 U.S. at 88; *Fortson*, 379 U.S. at 439. Indeed, in *Whitcomb*, *Burns*, and *Fortson*, the Court referred to the voting strength of "racial or political elements" of the voting population, thereby further undermining the argument that these are suspect classification cases rather than voting rights, or combined voting rights and suspect classification, cases. *Whitcomb*, 403 U.S. at 143; *Burns*, 384 U.S. at 88; *Fortson*, 379 U.S. at 439 (emphasis added).

<sup>30</sup> See *Davis v. Bandermer*, 478 U.S. 109, 113; *id.* at 132 (discussing the standard of proof "where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering").

<sup>31</sup> *Id.* at 118, 121-24.

<sup>32</sup> See *id.* at 119, 124-26.

<sup>33</sup> See *id.* at 134-37.

<sup>34</sup> *Id.* at 132.

<sup>35</sup> *Id.* at 133.

<sup>36</sup> In elections for the Indiana state senate, the plaintiff Democrats won 53.1% of the vote and also won 13 of the 25 seats at issue. See *id.* at 137-38 n.16.

<sup>37</sup> See *id.* at 137.

<sup>38</sup> Bruce E. Cain, *Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist, and Reformer*, in *POLITICAL GERRYMANDERING AND THE COURTS* 121 (Bernard Grofman ed., 1990).



*Bandemer*, Professor Lowenstein also implicitly adopts the vote dilution model of gerrymandering.<sup>39</sup>

The vote dilution approach can be found in some of the *Vieth* opinions. Justice Souter, joined by Justice Ginsburg, refers to partisan gerrymandering as a species of vote dilution.<sup>40</sup> Justice Breyer's conclusion—that partisan gerrymandering is unconstitutional when used to deny a political majority a majority of seats in the legislature—also reflects the vote dilution idea.<sup>41</sup> However, on balance, the *Vieth* Court decidedly shifted its analysis of partisan gerrymandering away from the vote dilution model embraced in *Bandemer*. Although Justice Souter refers to partisan gerrymandering as vote dilution, only one of the five elements he lays out as part of a gerrymandering plaintiff's *prima facie* case refers to the burden that gerrymandering places on a political group's ability to elect a candidate.<sup>42</sup> His decision to focus gerrymandering claims on individual districts rather than on the statewide discrepancy between votes and seats is also inconsistent with the statewide seats/votes relationship, which, as *Bandemer* indicated, is central to the vote dilution approach.<sup>43</sup> Similarly, Justice Breyer's determination that only those gerrymanders that give an electoral minority a majority of legislative seats raise a constitutional concern—while implicitly treating as unchallengeable those plans that would give a 51%-majority 75% of the seats (or give a 49%-minority just 25% of seats)—also seems inconsistent with a general commitment to the vote dilution or even the "vote dilution plus" theory.<sup>44</sup> Justice Scalia's plurality opinion emphatically rejects the idea that any political group is entitled to legislative representation in proportion to its numbers,<sup>45</sup> while both Justice Kennedy's concurrence and Justice Stevens' dissent avoid reference to the vote dilution model altogether.

The vote dilution theory of the constitutional harm from gerrymandering has intuitive appeal.<sup>46</sup> An apportionment scheme that gives one

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<sup>39</sup> See also Daniel Hays Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS* 89 (Bernard Grofman ed., 1990) (referring to "[g]errymandering and similar vote dilution claims brought under the Equal Protection Clause").

<sup>40</sup> *Vieth*, 541 U.S. at 343, 351.

<sup>41</sup> *Id.* at 360-62.

<sup>42</sup> Justice Scalia contends that "no element" of Justice Souter's test "looks to the effect of the gerrymander on the electoral success, the electoral opportunity, or even the political influence, of the plaintiff's group." *Id.* at 297. However, the fourth element of the Souter test does address whether a gerrymander makes it more difficult for plaintiff's group to elect its preferred candidates. See *id.* at 349-50.

<sup>43</sup> *Id.* at 347-50, 353.

<sup>44</sup> *Id.* at 361.

<sup>45</sup> *Id.* at 287-88.

<sup>46</sup> See, e.g., Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in *REPRESENTATION AND REDISTRICTING ISSUES* 9 (Bernard Grofman et al. eds., 1982) (observing that parties winning seats "roughly proportional to their share of the popular

party a greater share of legislative seats than its share of the popular vote while giving the other party a smaller share of seats than votes sounds like it denies the latter fair representation.<sup>47</sup> Moreover, it grows naturally out of the Equal Protection case law that generated the one person-one vote and racial vote dilution doctrines. Yet, as the relative eclipse of the vote dilution approach between *Bandemer* and *Vieth*—and even *Bandemer*'s earlier requirement not just of dilution but "dilution plus"—demonstrates, the vote dilution theory of gerrymandering is ultimately unsustainable for reasons long articulated by both judges and commentators.

First, the vote dilution model of gerrymandering assumes that voters fall into discrete and discernable partisan groups so that a party's share of legislative seats can be compared with its share of the electorate.<sup>48</sup> But, of course, this is often not the case. Voters can split their tickets or change their partisan voting patterns without changing their party registrations, and many voters are not registered with a party at all. Comparing seats to actual votes in legislative elections is not helpful because the actual votes in a legislative election may be an artifact of the districting plan itself—in a one-party district, for example, members of the out-party may not even bother to vote—or of anomalies such as an unusually charismatic or a scandal-ridden candidate. As a result, gerrymandering critics often prefer not to use the aggregate votes for legislative candidates but rather some other measure of party strength, such as the statewide vote for a down-ticket state office.<sup>49</sup> But, of course, any such measure of so-called baseline voting strength will be debatable.<sup>50</sup>

Second, even if party affiliation were more firm than fluid, and party share of the electorate could be determined, there is the theoretical objection that the vote dilution paradigm is at bottom a theory of proportional representation, and, as Justice Scalia emphatically asserted in *Vieth*, "the Constitution contains no such principle" of proportional rep-

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vote . . . is the very core of the term *fair representation*") (italics in original); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. Rev. 1, 52 (1985) [hereinafter Lowenstein & Steinberg, *The Quest*] (articulating, but critiquing, "[t]he most popular conception of how votes and seats in legislative elections should be related is that they should be proportional").

<sup>47</sup> Cf. Richard Niemi & Stephen G. Wright, *Majority-Win Percentages: An Approach to the Votes-Seats Relationship in Light of Davis v. Bandemer*, in *POLITICAL GERRYMANDERING AND THE COURTS* 267 (Bernard Grofman ed., 1990) (noting that "[t]he relationship between votes and seats is . . . of paramount importance").

<sup>48</sup> Cf. MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR 5 (1st ed., 1993) (arguing that the claim of partisan gerrymandering "presupposes the existence of durable, identifiable groups of voters").

<sup>49</sup> See, e.g., Charles Backstrom, et al., *Establishing a Statewide Electoral Effects Baseline*, in *POLITICAL GERRYMANDERING AND THE COURTS* 159-66 (Bernard Grofman ed. 1990).

<sup>50</sup> See Daniel H. Lowenstein & Jonathan Steinberg, *The Quest*, *supra* note 46, at 59-60.

resentation.<sup>51</sup> Even the *Vieth* dissenters agreed that the Constitution does not require proportional representation.<sup>52</sup> To be sure, it is possible to promote proportional representation without requiring it, and, as amended Section 2 of the Voting Rights Act demonstrates, it is possible for Congress to pass a law discouraging state and local legislative actions that make proportionality more difficult to accomplish while expressly disclaiming any intent to mandate proportionality.<sup>53</sup> However, to say that the gist of the constitutional problem raised by partisan gerrymandering is the reduction of a party's legislative representation relative to its share of the popular vote (however that is measured) is to implicitly read a norm of proportional representation into the Constitution.

Third, even if a norm of proportional representation could be read into the Constitution, the single-member district system required by law for congressional elections and also used by virtually every state legislature makes proportionality difficult to achieve. In the extreme case, with the two major parties evenly distributed throughout a state, if a party were to win 51% of the vote in every district, it would win 51% of the statewide popular vote but 100% of the statewide legislative seats. Political scientists speak of the tendency of single-member district systems to overrepresent majorities as the "winner's bonus;"<sup>54</sup> other anomalies may occur as well. District elections "are designed for purposes other than attaining proportionality; these include encouraging consensus-based politics and enabling the formation of a governing majority."<sup>55</sup> If the Constitution requires proportionality, then the real constitutional violation is the use of single-member districting rather than party-proportional representation. Given the longstanding and widespread use of districting in the American political system, districting must be presumed constitutional. As a result, the norm of proportionality is of uncertain constitutional foundation. It cannot be that proportional representation is constitutionally required or that a districting plan is unconstitutional simply because it fails to provide rough proportional representation.<sup>56</sup>

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<sup>51</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004).

<sup>52</sup> See *id.* at 338 (opinion of Justice Stevens); *id.* at 352 n.7 (opinion of Justice Souter); *cf. id.* at 357–58 (opinion of Justice Breyer) (noting the tension between single-member district systems and proportional representation).

<sup>53</sup> 42 U.S.C. § 1973(b)(2005).

<sup>54</sup> DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* 26–39 (1967).

<sup>55</sup> JEREMY BUCHMAN, *DRAWING LINES IN QUICKSAND: COURTS, LEGISLATURES, AND REDISTRICTING* 61–62 (2003); see also *Vieth*, 541 U.S. at 357 (Breyer, J., dissenting) (arguing that "[a] single-member-district system helps to ensure certain democratic objectives better than many 'more representative' (i.e., proportional) electoral systems").

<sup>56</sup> A more sophisticated version of the vote dilution argument, which acknowledges that single-member districting systems rarely generate proportionate results and can be affected by the winner's bonus, is the argument from "symmetry"—that is, the argument that if one party receives x% of legislative seats when it gets y% of the vote, then the other party should also

Of course, the vote dilution theory has been accepted in the context of districting schemes that tend to exclude racial minorities. However, vote dilution with respect to racial minorities is arguably different; racial division may be sharper and more durable than partisanship. Indeed, the emergence of the doctrine of racially polarized voting in racial vote dilution cases makes a successful claim of racial vote dilution hinge on proof of strong and consistent difference in white and non-white voting patterns. Racial segregation in housing and settlement patterns may also make districting a workable technique for addressing racial vote dilution—although, as the *Shaw v. Reno* line of cases demonstrates, racial vote dilution and districting may conflict when larger districts and non-compact racial groups are involved. Most racial vote dilution litigation is based on statute, not the Constitution. Moreover, as Professor Lowenstein has suggested, the constitutional hostility to the proportional representation roots of vote dilution may be overcome when dilutive measures are aimed at “pariah” groups that have been the subject of longstanding and pervasive mistreatment. The representational harm in these cases comes not so much from gerrymandering alone as from the totality of public and private actions that together exclude racial minorities from equal access to the political process.<sup>57</sup> Finally, as I will suggest in my discussion of the “excessive partisanship” model of partisan gerrymandering, the constitutional racial vote dilution cases are classic instances of the improper legislative motivation at the core of that model of gerrymandering.

#### B. THE FIRST AMENDMENT

In his separate *Vieth* opinion, Justice Kennedy raised the idea that the First Amendment, not the Equal Protection Clause, “may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”<sup>58</sup> Legal scholars have also suggested that the First Amend-

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get x% of the seats, and not more or less, when it gets y% of the vote. See Adam B. Cox, *Partisan Gerrymandering and Disaggregate Districting*, 2004 SUP. CT. REV. 409, 419–22 & nn.31–36. Yet, as Professor Lowenstein and Jonathan Steinberg have pointed out, symmetry analysis relies heavily on hypothetical elections and on the uniform behavior of voters across districts. It is also ultimately inconsistent with the separate district-specific legislative elections that occur under single-member districting. See Lowenstein & Steinberg, *The Quest*, *supra* note 46 at 55–60. Moreover, whereas seats-votes proportionality is at least inferable from the Equal Protection norm of one person-one vote, the constitutional basis for something as sophisticated as symmetry seems uncertain.

<sup>57</sup> See *White v. Regester*, 412 U.S. 755, 765–69 (1973).

<sup>58</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004).

ment's protection of the rights of party members may be the basis of a constitutional challenge to partisan gerrymandering.<sup>59</sup> The First Amendment argument builds on the Supreme Court's patronage cases,<sup>60</sup> which deny the state the power to condition a government contract or governmental hiring or promotion on partisan activity.<sup>61</sup> Justice Kennedy contends that, like a political activity test for government benefits, partisan gerrymandering "subjects a group of voters or their party to disfavored treatment because of their views"<sup>62</sup> and, thus, violates the First Amendment.

Like the Equal Protection argument, the First Amendment analysis is rooted in the constitutional text and is reasonably connected to constitutional doctrine, including the cases protecting the associational rights of political parties<sup>63</sup> and the patronage cases. The First Amendment analysis also explains why there might be concern about districting plans that particularly burden or penalize political parties, but not other groups such as "farmers or urban dwellers."<sup>64</sup> It reminds us that, despite Professor Lowenstein's effort to sever them, when districting plans make it harder for adherents of a political party to elect their candidates to office, fundamental rights and suspect classifications may be linked.

Yet, ultimately, the First Amendment argument fails. According to Justice Scalia, if the First Amendment operates with the same vigor in the districting context as it does with respect to patronage, it "would render unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs."<sup>65</sup> As he argues, the patronage cases require "not merely that Republicans be given a decent share of the jobs in a Democratic administration, but that political affiliation be *disregarded*."<sup>66</sup> Yet, even the *Vieth* dissenters acknowledge that some atten-

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<sup>59</sup> See, e.g., Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1131-39 (2005); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 652-53 (2002). See also Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment*, 91 CAL. L. REV. 1209 (2003) (arguing that the First Amendment right of association protects racial minorities in legislative representation).

<sup>60</sup> See *Vieth*, 541 U.S. at 314 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)).

<sup>61</sup> See, e.g., *Board of Commissioners v. Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Service, Inc v. City of Northlake*, 518 U.S. 712 (1996); *Rutan v. Republic Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod*, 427 U.S. 347 (1976).

<sup>62</sup> *Vieth*, 541 U.S. at 314.

<sup>63</sup> See *id.* at 314-16 (citing *California Democratic Party v. Jones*, 530 U.S. 567 (2004); *Eu v. San Francisco Country Democratic Central Comm.*, 489 U.S. 214 (1989); *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

<sup>64</sup> See *Vieth*, 541 U.S. at 288.

<sup>65</sup> *Id.* at 294 (emphasis in original).

<sup>66</sup> *Id.* (emphasis in original). Accord, Richard L. Hasen, *Looking for Standards (in all the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELEC. L. J. 626, 635 (2004).

tion to partisan concerns in districting is sometimes appropriate,<sup>67</sup> and the Court has repeatedly upheld party-conscious districting.<sup>68</sup> Indeed, so long as districting is undertaken by legislatures elected on partisan lines, legislative awareness of, and attention to, the partisan consequences of districting seems impossible to avoid.<sup>69</sup>

On the other hand, if the First Amendment is not an absolute prohibition on attention to partisan concerns, then it is unclear what work the First Amendment theory does. Recent cases involving state regulation of party activity have held that the level of judicial scrutiny of a state's action is likely to be tied to the severity of the burden that gerrymandering poses on party voters' associational rights.<sup>70</sup> Gerrymandering does not deny any group of party voters the right to vote, the right to an equally weighted vote, the opportunity to seek "public benefits or privileges," or the freedom "to canvass the electorate, enroll or exclude potential members, nominate the candidate of its choice, and engage in . . . electoral activities."<sup>71</sup> Gerrymandering harms parties by making it harder for the party group to win its "fair share" of seats. This result is the vote dilution harm all over again, and as the vote dilution discussion indicates, party voters do not have a constitutionally protected interest in proportional representation.

In short, the First Amendment argument against partisan gerrymandering, focused as it is on the rights of party voters, fails either because it creates a rigid and unworkable barrier to legislative attention to partisan considerations, or because all it does is restate, without providing new or more persuasive reasons, the claim that party voters are entitled to proportional representation.

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<sup>67</sup> See *Vieth*, 541 U.S. at 351 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting). At one point Justice Stevens seems to contend that any reliance on party affiliation in districting is unconstitutional. See *id.* at 325 ("political affiliation is not an appropriate standard for excluding voters from a congressional district"); however, the general thrust of his opinion is that partisan motivation is unconstitutional only when it dominates the districting process or is the "sole and unadorned purpose" of the legislature. *Id.* at 326. Thus, even Justice Stevens appears to agree that some attention to partisanship is permissible. Similarly, Justice Kennedy finds that the First Amendment is violated only when the role of "partisan interest in the redistricting process is excessive." *Id.* at 316.

<sup>68</sup> See e.g., *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Easley v. Cromartie*, 532 U.S. 234 (2001).

<sup>69</sup> Nearly a dozen states have created districting commissions to redistrict their state legislatures, and another ten states have either created advisory districting commissions or provided for districting commissions to redistrict in the event that the legislature is unable to act. See BUCHMAN, *supra* note 55, at 207–10. However, districting commission members are often appointed by parties in the legislature, and commissions may be attentive to partisan concerns. See *id.* at 219–20; Persily, *supra* note 59, at 674–77.

<sup>70</sup> Cf. *Clingman v. Beaver*, 125 S.Ct. 2029, 2035 (2005).

<sup>71</sup> *Id.*

## C. COMPETITIVENESS

The most important recent development in the legal academic literature is the effort by Professor Samuel Issacharoff<sup>72</sup> and other legal scholars<sup>73</sup> to reframe the gerrymandering debate around a concern for electoral competitiveness.<sup>74</sup> In their view, the gravamen of the harm caused by districting is that by organizing voters into districts designed to assure one party or the other victory in particular districts, gerrymandering eliminates electoral competitiveness, and thus undermines the ability of the voters to use elections to ensure the responsiveness of elected officials to the voters' interests.<sup>75</sup> From the perspective of competitiveness, the real injury from gerrymandering is not to the rights of the partisan groups (that win fewer seats or that are sorted into one district or another because of their party), but to the political structure as a whole, as a result of the reduced competitiveness of legislative elections. From this perspective, even the voters in the majority party may lose out if and when they are placed in districts engineered to provide the majority party with a safe seat since—just like voters in the minority party—the lack of competitiveness limits their ability to hold their representative accountable. Whereas the vote dilution model would surely result in a dismissal of a challenge to a so-called bipartisan gerrymander—in which each party received “safe” seats in proportion to its overall share of the electorate, an arrangement also surely accepted by the more moderate version of the First Amendment theory—the competitiveness challenge views such a “sweetheart gerrymander”<sup>76</sup> as just as bad as a one-party gerrymander.

The competitiveness critique draws its strength from the perception that the sophisticated gerrymandering of the last two decades has “deadened competition”<sup>77</sup> by leading to a growing number of safe seats and landslide reelections, with correspondingly fewer close races and challengers increasingly unable to oust incumbents. It resonates with the view among many electoral scholars that the role of constitutional law in shaping the political process should be primarily structural, aimed at ensuring “competition and through it electoral accountability,”<sup>78</sup> rather than

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<sup>72</sup> See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684 (2002).

<sup>73</sup> See e.g., Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459 (2004); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Partisan Gerrymandering*, 153 U. PA. L. REV. 541 (2004).

<sup>74</sup> Professor Lowenstein has also written more skeptically about the competitiveness concern. See Lowenstein & Steinberg, *The Quest*, *supra* note 46, at 37–44.

<sup>75</sup> See Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 72, at 612.

<sup>76</sup> *Id.* at 628.

<sup>77</sup> Ortiz, *supra* note 73, at 486.

<sup>78</sup> Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 Elec. L. J. 685, 688 (2004).

individual rights-oriented—at least once the fundamental rights, such as the right to vote, are secured. So far, the competitiveness theory of gerrymandering has been embraced only by academics, although elements of it can be found in Justice Souter's<sup>79</sup> and Justice Breyer's<sup>80</sup> concerns about the impact of gerrymandering on the "democratic process." However, Justice Souter's dissent expressly accepted bipartisan gerrymanders that give the minority party proportional representation,<sup>81</sup> while Justice Breyer limited his concern to gerrymanders that "entrench" a minority into a majority of seats, implicitly accepting "safe seats" in other settings.

Like vote dilution, the competitiveness theory has considerable intuitive appeal. After all, as Professor Issacharoff has emphasized, the central purpose of elections—enabling the people to hold their representatives accountable—is frustrated by the creation of non-competitive districts.<sup>82</sup> The competitiveness norm shifts the analysis of partisan gerrymandering from the rather questionable right of a group of party voters to elect representatives in proportion to their numbers—or to be free from districting plans that make it harder for them to do that—to the bedrock values of popular sovereignty and electoral accountability. The competitiveness theory also makes it possible to challenge bipartisan gerrymanders that create safe seats for both parties, thereby avoiding a vote dilution challenge, while denying voters of both parties competitive elections.

On the other hand, the competitiveness theory suffers from a number of problems. Although competitive elections promote popular control over government, there is no specific constitutional text or doctrine promoting competitiveness,<sup>83</sup> at least where the threat to competition does not come from districting arrangements that burden the right to vote, form a political party, campaign, or get on the ballot. The threat gerrymandering poses to competitiveness comes not from districting per se, but from the interplay of gerrymandering with a host of other political factors. The extent to which district-level competition is in decline or that gerrymandering is responsible is debatable.<sup>84</sup> Indeed, the very meaning of competitiveness is vague and uncertain. The scholars who

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<sup>79</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 345-36 (2004).

<sup>80</sup> See *id.* at 364.

<sup>81</sup> See *id.* at 351-52 n.6.

<sup>82</sup> See Issacharoff, *Why Elections?*, *supra* note 72, at 684.

<sup>83</sup> *But cf. id.* at 687-88 (dismissing the textual objection by asserting the lack of a textual foundation for other election law doctrines).

<sup>84</sup> See Persily, *supra* note 59, at 664-67. Professor Persily notes that incumbent reelection rates have also increased in statewide elections, such as races for the United States Senate, which are unaffected by redistricting. See *id.* at 666. He argues that among the reasons for reduced electoral turnover are the "rise of candidate-centered politics, the increased use of [the] perquisites of office (such as pork-barreling, the franking privilege, credit claiming, and



have raised the competitiveness argument have tended to emphasize the lack of turnover and the widening margins of victories in gerrymandered districts, but it is unclear whether competitiveness requires turnover or even close races. In a state that is dominated by one party, elections might be considered competitive even if the other party rarely wins, so long as challengers are free to run for office, get on the ballot, solicit support, and get their messages to the voters, and voters are free to vote for them without fear of retribution. On the other hand, if consistent majority party success is considered to violate the competitiveness norm, it is difficult to see how that would be unconstitutional.

Moreover, like the vote dilution and First Amendment arguments, competitiveness is in tension with districting. Even in a state that is competitive statewide—in the sense that the two major parties may get relatively equal shares of the votes—it is highly unlikely that each party's strength will be evenly distributed throughout the state. Democrats, for example, may be concentrated in the cities; Republicans in the suburbs or in rural areas. In such a state, even a non-gerrymandered district plan would create a large number of districts “naturally” dominated by one party or the other. By fragmenting a state, the single-member-district system of representation almost certainly generates a less competitive electoral structure than statewide proportional representation. However, returning to the point already made, single-member districting is the paradigmatic way in which representatives are elected. This suggests that although competitiveness is an important value, it cannot be considered an overarching constitutional command.

Recently, Professor Issacharoff and Professor Karlan have acknowledged that competitiveness is at odds with districting, and that pushing competitiveness may actually require gerrymandering. As they note, “[t]here will always be Berkeley and Orange County, or their equivalents. It would take a radical gerrymander to carve up stable and politically homogeneous areas in order to bring them to a contested balance between the major parties.”<sup>85</sup> As a result, they do not “claim that an electoral system requires *every* district to be competitive.”<sup>86</sup> But a constitutional norm that applies only to some legislative districts and not others is a curious norm, indeed.

With the universal applicability of competitiveness disclaimed, and the inevitability of some constitutional noncompetitive districts accepted, the competitiveness theory really turns into a theory of the harm to com-

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casework), and rising campaign costs that inhibit effective challengers.” *Id.* “Gerrymandering, while still a contributing factor, is quite far down on the list.” *Id.*

<sup>85</sup> Issacharoff & Karlan, *supra* note 73, at 574.

<sup>86</sup> *Id.* cf. Lowenstein & Steinberg, *The Quest*, *supra* note 46, at 37-44 (distinguishing between “strong competitiveness” and “weak competitiveness” arguments and rejecting both).

petitiveness done by “insider manipulation of the process for partisan gain”<sup>87</sup> and “the insult to the competitiveness of the process resulting from the ability of insiders to lessen competitive pressures.”<sup>88</sup> In other words, the real constitutional violation is not the lack of competitiveness per se, but the “insult” to the process caused by “insider manipulation,” an argument that sounds much like the excessive partisanship argument addressed in the next section.

#### D. EXCESSIVE PARTISANSHIP AND LEGISLATIVE PURSUIT OF SELF-INTEREST

The fourth and final theory of the constitutional violation posed by gerrymandering, as best articulated by Justice Stevens’ *Vieth* dissent, is that excessive partisanship violates the legislature’s constitutional duty “to govern impartially.”<sup>89</sup> When legislative districting decisions are dominated or solely determined by partisanship, the legislature violates its duty to act impartially and, indeed, acts without “rational justification.”<sup>90</sup> The *Vieth* plurality tacitly accepted this understanding of the nature of the constitutional violation posed by gerrymandering. Citing Justice Stevens’ determination that “severe partisan gerrymanders” are “incompatibl[e] . . . with democratic principles,” Justice Scalia wrote, “we do not disagree with that judgment” and immediately analogized it to the unconstitutionality of the Senate’s use of procedures in impeachment proceedings that are “incompatible with its obligation to ‘try’ impeachments.”<sup>91</sup> Subsequently, Justice Scalia cited Justice Stevens’ “argument that an *excessive* injection of politics is *unlawful*. So it is, and so does our opinion assume.”<sup>92</sup> Justices Souter and Ginsburg, despite their reference to the vote dilution theory, also seem to treat excessive partisanship as the basis for invalidating a gerrymander.<sup>93</sup>

The excessive partisanship theory of the unconstitutionality of gerrymandering focuses on legislative intent. Although vote dilution, burdening of minority parties, or reduction of competition may result from gerrymandering, those are political injuries, not constitutional harms. The excessive partisanship theory might treat those factors as evidence of a constitutional violation but not as the violation itself. The constitutional harm is the legislature’s violation of its obligation to act only in the public interest. For that reason, I would broaden the notion of excessive partisanship to include excessive pursuit of legislators’ self-interest,

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<sup>87</sup> Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 72, at 597.

<sup>88</sup> *Id.* at 600.

<sup>89</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004).

<sup>90</sup> *Id.* at 318. *See also id.* at 326.

<sup>91</sup> *Id.* at 292.

<sup>92</sup> *Id.* at 293.

<sup>93</sup> *See id.* at 354-55.

which might include the creation of districts designed to ward off primary as well as general election challenges or to advance the political fortunes of a member of a leading legislator's family.<sup>94</sup> Excessive partisanship is merely one instance, albeit an extremely important one, of legislative pursuit of individual or group self-interest; it does not exhaust that category.<sup>95</sup>

Professor Lowenstein charges that the "extreme partisanship" theory—the only theory of the unconstitutionality of gerrymandering that he actually addresses—"is not only unmoored to principles in the Equal Protection Clause or any other constitutional provision," but actually "runs contrary to the Constitution."<sup>96</sup> There is something to the "unmoored" point. There is no specific text that condemns excessive legislative partisanship or the pursuit of self-interest. Indeed, as already noted, the First Amendment's approach to the protection of political rights suggests a more all-or-nothing approach rather than one focused on "excessive" activity. Yet, the notion that legislation, in order to be valid, must be rationally related to the promotion of a legitimate public purpose, is well-established. Government actions that have no public purpose justification but aim only to advance private preferences are unconstitutional. Professor Cass Sunstein has suggested that "the prohibition of naked preferences" can be found in six different provisions of the Constitution,<sup>97</sup> but the most available constitutional rubric may be the Due Process Clause. As the Supreme Court recently observed, "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."<sup>98</sup> Indeed, the Due Process Clause is intended to prevent "the exercise of power without any reasonable justification in the service of a legitimate governmental objective."<sup>99</sup> Districting decisions that can be explained

<sup>94</sup> See, e.g., *Larios v. Cox*, 300 F.Supp.2d 1320, 1335 (N.D. Ga. 2004) (citing testimony that the majority leader of the Georgia state senate tried to create a congressional district "that he hoped would lead to a successful congressional campaign for his son").

<sup>95</sup> Professor Berman reads Justice Stevens' dissent as assuming that "any pursuit of partisan advantage in redistricting is unconstitutional." See Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 811 (2005). Certainly, Justice Stevens demonstrates considerable skepticism about partisanship as a motive for legislative action. See, e.g., *Vieth*, 541 U.S. at 324. But, he does not rule out all attention to partisan concerns. Rather, he finds that unconstitutional gerrymandering occurs only when partisanship is the "sole and unadorned purpose." *Id.* at 326, the "single" criterion, *id.*, or the "sole motivation," *id.* at 318, for a districting plan. Certainly, the plurality treats Justice Stevens' opinion as concerned with excessive partisanship, not partisanship per se. See *id.* at 293.

<sup>96</sup> Lowenstein, *Vieth's Gap*, *supra* note 8, at 384.

<sup>97</sup> See Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (citing the dormant commerce, privileges and immunities, equal protection, due process, contracts, and eminent domain clauses).

<sup>98</sup> *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2083 (2005).

<sup>99</sup> *Id.* at 2084 (citing and quoting *Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

only by pure partisanship, or pure pursuit of the self-interest of the individual members of the legislature, fail to serve a legitimate governmental objective and are thus arbitrary, irrational and unconstitutional. To be sure, gerrymandering does not involve the application of state power to individual property or liberty, so that Due Process may not literally apply *ex proprio vigore*. But Due Process nicely illustrates the broader principle that government action must have a public purpose.

Of course it could be argued, as Professor Lowenstein does, that even extreme partisan gerrymandering serves a public purpose. Citing Madison's Federalist Number 51, Professor Lowenstein contends that the Constitution does not "abjure self-interest on the part of elected officials. To the contrary, it *relies* on self-interest—'personal motives'—to assure that '[a]mbition [will] be made to counteract ambition.' . . . In short, the Constitution does not try to prevent political competition from going 'too far.' It *depends* on competition to preserve the balanced structure of the government."<sup>100</sup>

The focus of Federalist Number 51, of course, was not on the self-interest of individual legislators, but on the protection of the "rights of the people."<sup>101</sup> In this number of the Federalist, Madison lays out the theory of how intra- and inter-governmental conflict—that is, the separation of powers and federalism—provide a "double security" for the people against tyranny.<sup>102</sup> But how would the Constitution "[maintain] in practice the necessary partition of power among the several departments"<sup>103</sup> of the federal government and keep each of the branches "in their proper places"?<sup>104</sup> That is where "personal motives,"<sup>105</sup> along with "the necessary constitutional means,"<sup>106</sup> come into play. The combination of personal interest and constitutional powers would enable the branches of government "to resist encroachments of the others."<sup>107</sup> The personal interests of legislators, judges, and members of the executive branch play a role, but only in providing them with a reason for enforcing the separation of powers, and thereby protecting the liberties of the people.

Elsewhere in the Federalist, Madison demonstrates a keen sense of the potential threat posed by the abuse of legislative power and by the consequent need for the people to be able to control their government

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<sup>100</sup> Lowenstein, *Vieth's Gap*, *supra* note 8, at 385 (quoting James Madison, THE FEDERALISTS NO. 51 at 346 (Heritage Press ed., 1945)).

<sup>101</sup> THE FEDERALIST NO. 51 at 349 (James Madison) (Heritage Press ed., 1945).

<sup>102</sup> *Id.* at 349.

<sup>103</sup> *Id.* at 346.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 347.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

through the electoral process. As he explained in Federalist Number 37, “the genius of republican liberty seems to demand on one side, not only that all power should be derived from the people but that those entrusted with it should be kept in dependence on the people.”<sup>108</sup> Again, in Federalist Number 51, he explains that “[a] dependence on the people is, no doubt, the primary control on government.”<sup>109</sup> And in Federalist Number 57, he emphasizes that all other constraints on the legislature “would be found very insufficient without the restraint of frequent elections.”<sup>110</sup>

Excessive legislative pursuit of self-interest in the districting process subverts the popular sovereignty, which as Madison explained, is the foundational assumption of the Constitution. When legislative self-interest becomes the overarching factor in redistricting decisions we are faced with the spectacle of the representatives choosing their people rather than the people choosing their representatives. This is, of course, very close to the argument from electoral competition previously discussed. My difference with the competitiveness argument is that the Constitution does not require competitiveness *per se*—since natural background political factors may make particular districts or states relatively noncompetitive—but that the Constitution is offended when legislators engage in redistricting solely to promote their personal or partisan interests and thereby undermine the ability of the voters to assure that the legislature is dependent on the people. This argument is also consistent with the concern—expressed by the competitiveness scholars, as well as by Justice Breyer—of legislative “manipulation” of district lines solely to “entrench” incumbent individuals or parties against challenges.

The illegitimacy of excessive legislative pursuit of self-interest is nicely illustrated by the decision of the federal district court, affirmed *per curiam* by the Supreme Court after *Vieth*, in *Larios v. Cox*.<sup>111</sup> *Larios* addressed redistricting plans for the upper and lower houses of the Georgia state legislature. The deviations from population equality were just under 10% for each chamber, or apparently within the deviation from equality in state legislative plans which the Supreme Court had previously indicated was constitutional. The district court, however, found that the deviations from equality were driven largely by the efforts of the then-dominant Democratic party to protect Democratic incumbents, or to promote the more idiosyncratic interests of individual members, including the desire of one member to advance the political fortunes of his son, and the desire of another member to create a district which would be a

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<sup>108</sup> THE FEDERALIST NO. 37 at 234 (James Madison) (Heritage Press ed., 1945).

<sup>109</sup> THE FEDERALIST NO. 51 at 348 (James Madison) (Heritage Press ed., 1945).

<sup>110</sup> THE FEDERALIST NO. 57 at 384 (James Madison) (Heritage Press ed., 1945).

<sup>111</sup> 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd* 124 S. Ct. 2806 (2004).

springboard for a subsequent congressional campaign.<sup>112</sup> The “selective incumbent protection,”<sup>113</sup> “blatant[ ]”<sup>114</sup> partisanship, domination by “the personal interests of individual legislators,”<sup>115</sup> and instances of unvarnished “regional favoritism,”<sup>116</sup> negated the state’s efforts to justify the plans’ departures from population equality and rendered the plans unconstitutional. Although, as a matter of precedent, *Larios* does not mean that a partisan plan that fails to achieve population equality is necessarily unconstitutional, it does suggest that extreme partisanship and legislative pursuit of self-interest in districting is, Professor Lowenstein’s argument notwithstanding, contrary to constitutional norms.

Professor Lowenstein contends that “[a] premise underlying much contemporary study of legislative politics is that *all* legislative conduct is motivated solely by the desire for reelection,”<sup>117</sup> although he quickly retreats to the less sweeping assertion that the motive for reelection is a major influence in virtually all policymaking.”<sup>118</sup> Even assuming that legislative self-interest plays a major role in legislative decision-making, it is rare that self-interest is the exclusive factor. Most actions that would promote a legislator’s reelection do so by advancing the interests of the legislator’s constituency or of interests groups within (or outside) the constituency. The pork-barrel legislation that Professor Lowenstein denounces exemplifies the practice of promoting reelection by aiding others. There is almost always some public interest justification for pork-barrel legislation, even if the “public interest” is that of the constituency rather than the state or nation, and even if the public justification cannot stand up to a rigorous cost-benefit analysis. Excessively partisan or self-interested gerrymandering is different; the only things they promote are the legislator’s reelection, the election of a family member, or the legislator’s party’s ability to hold on to its majority and, thus, enhance the legislator’s power. There is no public interest rationale.

Moreover, as the competitiveness critics have pointed out, excessively self-interested gerrymandering can have a devastating effect on the electoral accountability necessary to assure the legislature’s “dependency” on the people. As Dennis Thompson has put it, “insofar as it involves politicians’ choosing their own constituents” to protect themselves in office, it can “undermine popular sovereignty.”<sup>119</sup> Whether ex-

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<sup>112</sup> See *id.* at 1335-36.

<sup>113</sup> *Id.* at 1331.

<sup>114</sup> *Id.* at 1347.

<sup>115</sup> *Id.* at 1355.

<sup>116</sup> *Id.* at 1342.

<sup>117</sup> Lowenstein, *Vieth’s Gap*, *supra* note 8, at 387 (emphasis in original).

<sup>118</sup> *Id.* at 378-88.

<sup>119</sup> DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* 41 (2002).

cessively self-interested districting is more or less harmful to the country than “confiscatory taxation”<sup>120</sup> may be debatable, but excessively self-interested districting is more likely to lack a public justification, and certainly poses a greater government threat to the fair electoral competition that ultimately legitimates all government action. Indeed, a central theme of modern constitutional legal scholarship is the special legitimacy of what John Hart Ely called representation-reinforcing review—that is, judicial intervention to “polic[e] the process of representation” and prevent incumbents from blocking “the channels of political change.”<sup>121</sup>

To be sure, it may be difficult, in practice, to determine when a districting plan is tainted by excessive pursuit of legislative personal or partisan self-interest, or to distinguish between excessive pursuit of partisan or personal goals and the permissible attention to such factors in the context of constructing a districting plan. But, to turn Professor Lowenstein’s point around, that is a question of practicality and, as I discuss in the next section, of justiciability. As a question of principle, however, there is no doubt that, as both the *Vieth* plurality and dissenters concluded, a districting plan marked by excessive pursuit of personal or partisan self-interest is unconstitutional.

### III. BACK TO THE JUSTICIABILITY QUESTION

Establishing that excessive pursuit of legislative self-interest in districting states a constitutional claim may be a mere pyrrhic victory for gerrymandering critics if the constitutional issue as so defined creates a nonjusticiable question. Surely, drawing a line between permissible and excessive attention to the same factor will be tricky at best, and making such a distinction the basis for judicial review raises the concern that it will enable judges to vote their own political biases in gerrymandering cases. Are there judicially manageable standards that will assure consistency in the adjudication of partisan gerrymandering disputes?

The question of the specific standards for proving partisan gerrymandering—the question addressed in Justice Stevens’ and Justice Souter’s dissents as well as in Justice Scalia’s corrosively skeptical plurality opinion—is beyond the scope of this Comment. However, there is some evidence that courts can address districting cases that require distinguishing between permissible and impermissible uses of the same factor.

First, as already noted, courts have done this with respect to partisan and personal self-interest at least once—in *Larios v. Cox*.<sup>122</sup> The district court in that case had no difficulty finding that the plans in question were

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<sup>120</sup> See Lowenstein, *Vieth’s Gap*, *supra* note 8, at 386.

<sup>121</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73, 105 (1980).

<sup>122</sup> 300 F. Supp. 2d. 1320 (N.D. Ga. 2004)

so marked by attention to partisan and self-interested concerns as to render their departures from population equality unconstitutional, even though the departures appeared to fall within the safe harbor for population deviations previously approved by the Supreme Court. The Supreme Court agreed with the district court's judgment.<sup>123</sup>

Second, and more importantly, distinguishing between excessive and permissible attention to a districting factor is at the heart of one of the Court's most important recent districting doctrines—*Shaw v. Reno*<sup>124</sup> and its progeny.<sup>125</sup> Although elements of *Shaw* seemed to suggest that the Court was concerned about any intentional use of race or the use of a bizarre district shape that could only be explained by attention to race,<sup>126</sup> the doctrine ultimately became one of excessive attention to race, where race is "the dominant and controlling rationale in drawing district lines"<sup>127</sup> or the "predominant" factor.<sup>128</sup> Some attention to race in districting is permissible.<sup>129</sup> The *Shaw* doctrine thus provides a nice analogy and precedent for a similar distinction between excessive and permissible uses of partisanship or self-interest.<sup>130</sup>

Of course, some would suggest that the analogy to *Shaw*'s notoriously fuzzy standard proves that a similar standard for partisan gerrymandering will be, by definition, unmanageable.<sup>131</sup> But, as Professor Pildes has recently pointed out, *Shaw* has proven surprisingly manageable: "[S]tate legislators and other actors internalized the vague legal constraints of *Shaw* in ways that generated a stable equilibrium."<sup>132</sup> Although the Supreme Court may have failed to supply clear standards for the application of *Shaw*, the political process absorbed *Shaw*'s prohibition against excessive attention to race. Despite the indeterminacy of the *Shaw* doctrine, there has been relatively little *Shaw* litigation.<sup>133</sup> "The result was political accommodation and compromise that led to stable outcomes. . . . [V]ague law was transformed into settled practice."<sup>134</sup>

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<sup>123</sup> *Cox v. Larios*, 542 U.S. 947 (2004). See also Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 77-78 (2004) ("*Larios* might signal the vitality of a broader principle against state action whose sole or predominant purpose is self-entrenchment of incumbents or parties . . .").

<sup>124</sup> 509 U.S. 630 (1993).

<sup>125</sup> See, e.g., *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Hunt v. Cromartie*, 526 U.S. 541 (1999).

<sup>126</sup> See *Shaw*, 509 U.S. at 642-49.

<sup>127</sup> *Miller*, 515 U.S. at 913.

<sup>128</sup> *Vera*, 517 U.S. at 959 (plurality opinion).

<sup>129</sup> See *id.* at 993 (O'Connor, J., concurring).

<sup>130</sup> See *Vieth*, 541 U.S. at 334-36 (Stevens, J., dissenting).

<sup>131</sup> See *Cox v. Larios*, 542 U.S. 947, 436 (2004).

<sup>132</sup> Pildes, *supra* note 123, at 68.

<sup>133</sup> *Id.* at 67.

<sup>134</sup> *Id.* at 68-69.



To be sure, as Justice Scalia has suggested, the use of partisanship in districting may be more widespread than the use of race. Bipartisan competition is widespread, at least at the state level, whereas there are some states with relatively little racial division, so that making partisan gerrymandering justiciable is likely to lead to more litigation than *Shaw*'s rule against excessively race-conscious districting.<sup>135</sup> On the other hand, Professor Pildes' evidence suggests that even in states where race is a real factor in politics, there has been relatively little racial gerrymandering once *Shaw*'s norm was "internalized."<sup>136</sup>

Whether the excessive/permissible distinction will be more difficult to draw, or cause more contention, for partisan gerrymandering than for *Shaw*-type claims is both an empirical question and a hypothetical one in the absence of a Supreme Court decision making the excessive promotion of partisan or personal self-interest in districting unconstitutional. Certainly, any standard of proving partisan gerrymandering will be more open-ended and discretionary than the one person, one vote rule. Perhaps, the high political stakes in partisan gerrymandering cases are a good reason for courts to stay out. On the other hand, the high political stakes in legislative redistricting create an incentive for legislatures to abuse their powers as well.

Ultimately, the justiciability question is tied to the constitutional question, or more specifically, to the seriousness of the threat to constitutional values posed by partisan gerrymandering. Defining the constitutional issue as the excessive pursuit of legislative self-interest or partisan interest clarifies the constitutional values at stake, but that does not tell us how great a threat partisan gerrymandering poses in practice. If the threat from gerrymandering is great, then the risks of judicial intervention are worth taking. If the threat is modest, then the dangers of judicial action may be too great.

Although the *Vieth* plurality treated excessive partisan gerrymandering as unlawful, the plurality seemed to view it as a relatively modest problem. For Justice Scalia, the long political pedigree of partisan gerrymandering seemed to validate it as a practice, or at least to make it an acceptable evil, if not a necessary one.<sup>137</sup> Professor Lowenstein also

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<sup>135</sup> See *Vieth*, 541 U.S. at 286. Justice Scalia appears to bolster his case that the permissible-excessive distinction will be harder to draw in the partisan than in the racial setting when he contends that "the purpose of segregating voters by race is not a lawful one" so that race is a "rare and constitutionally suspect motive." *Id.* However, the post-*Shaw* cases confirm that it is excessive attention to race, rather than the use of race per se, that triggers strict judicial scrutiny. It may be that the Court would have a different definition of what constitutes an "excessive" attention to race compared with an "excessive" attention to party, but both racial and partisan gerrymandering cases involve drawing a distinction between the permissible and excessive uses of a districting factor.

<sup>136</sup> See Pildes, *supra* note 123, at 67-70.

<sup>137</sup> See *Vieth*, 541 U.S. at 274.

finds partisan gerrymandering acceptable, and indeed well within the range of permissible party competition. By contrast, Justice Kennedy and the dissenters view partisan gerrymandering as far more troubling. As long as a majority of the court believes that, then the justiciability question will remain a live one. *Vieth* is surely a setback for efforts to seek judicial review of partisan gerrymandering; however, *Vieth* helps clarify the substance of the constitutional question raised by partisan gerrymandering, and demonstrates that for a majority of the Court partisan gerrymandering is a serious issue. Thus, even after *Vieth*, the future of constitutional challenges to partisan gerrymandering remains open.<sup>138</sup>

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<sup>138</sup> As this article was going to press the Supreme Court noted probable jurisdiction of the appeals in a quartet of cases challenging the mid-cycle re-redistricting of the Texas legislature. See *League of United Latin American Citizens v. Perry*, 126 S.Ct. 827 (2005); *Travis County v. Perry*, 126 S.Ct. 827 (2005); *Jackson v. Perry*, 126 S.Ct. 827 (2005); *GI Forum of Texas v. Perry*, 126 S.Ct. 829 (2005). These cases raise one person, one vote and Voting Rights Act issues, but they also give the Court the opportunity to revisit the question of partisan gerrymandering.

